



August 12, 2014

Evo Popoff, Assistant Commissioner
New Jersey Department of Education
100 River View Plaza
P.O. Box 500
Trenton, New Jersey 08625-0500

Re: Proposed Readoption with Amendments of Regulations Governing
Charter Schools, N.J.A.C. 6A:11
PRN 2014-089

Dear Assistant Commissioner Popoff:

Education Law Center ("ELC") works to secure the legal rights of New Jersey's 1.3 million public school children to high quality education under state and federal laws, particularly our state's at-risk students, students with disabilities, and students of color. ELC serves as counsel to the class of urban school children in the landmark Abbott v. Burke education equity litigation and provides legal services to students in special education, student discipline, school residency and other matters. As one of the nation's premier advocates for education rights for over 40 years, ELC has substantial expertise with New Jersey's charter school program, most notably whether charter schools operate equitably, effectively and strengthen education for all children in the communities they serve.

We write to address the compelling need for the Department of Education (DOE) to codify the Commissioner of Education's (Commissioner) obligations when making determinations with regard to charter schools. Existing case law has now firmly established the constitutional requirement mandating the Commissioner to assess both the segregative effects and the funding impact that a proposed or existing charter school will have on its district of residence, in order to avoid the deprivation of a thorough and efficient education to district students under Art. 8, para. 7 of the New Jersey Constitution. See, e.g., In re Grant of Charter Sch. Application of Englewood on the Palisades Charter Sch., 164 N.J.

316 (2000); IMO Proposed Quest Academy Charter School of Montclair Founders Group, 216 N.J. 270 (2013). In order to assure that the Supreme Court's directives are carried out in an effective and timely manner, it is essential that the DOE codify the "procedures and standards" that will govern the Commissioner's constitutional determinations. See Abbott v. Burke, 153 N.J. 480, 526 (1998) ("direct[ing] the Commissioner codify in regulation the Abbott remedial measures).

SEGREGATIVE EFFECTS

ELC recently obtained a response to an Open Public Records Act (OPRA) request that produced no annual assessments of segregative effects for Newark charter schools, even though such assessments are expressly required under current DOE regulation. N.J.A.C. 6A:11-2.2(c). In response to further inquiry, the Attorney General, through Assistant Attorney General Michael Walters, advises that such assessments are undertaken for race only, and cannot be produced or made public because the assessments are not committed to writing. AAG Walters states:

NJDOE has advised that, consistent with Englewood on the Palisades II, it assessed the racial impact of [sic] that a charter school applicant will have on the district of residence. The assessment is not written, nor is there such a requirement.

[Email from Walters to David Sciarra, April 7, 2014]

This response rests on a mistaken understanding of the Commissioner's constitutional obligations in several respects. First, it suggests that DOE need only assess the "racial impact" of a proposed charter, and not segregative effects on other protected subgroups of students. Second, it appears to consider the one-time impact of "a charter school applicant" only and not the ongoing impact of existing, operating schools. Third, it takes the ludicrous position that a state agency can fulfill basic administrative functions without creating a written record. ELC addresses each issue below.

Type of Segregative Effects

The case referred to by AAG Walters, In re Charter School Application of Englewood on Palisades Charter School, 164 N.J. 316 (2000), limits its holding to the Commissioner's assessment of racial impact because that was the sole issue raised before the Court. However, the Court's ruling plainly derives from more expansive constitutional and statutory mandates. In

addition to the Commissioner's obligations under the Education Clause, the constitutional provision supporting the Court's decision bars segregation not only on race, but also on religious principles, color, ancestry and national origin. N.J. Const. Art. I, para. 5. The statutory underpinning for the Court's decision is broader yet, requiring charter schools, to the maximum extent practicable, to seek "enrollment of a cross section of the community's school age population including racial and academic factors." N.J.S.A. 18A:36A-8(e).

Legislative intent for assessing broad segregative effects is further clear from two other statutory provisions. First, the Legislature explicitly chose to bar discrimination by charter schools in admission policies or practices "on the basis of intellectual or athletic ability, measures of achievement or aptitude, status as a handicapped person, proficiency in the English language, or any other basis that would be illegal if used by a school district." N.J.S.A. 18A:36A-7. Second, in requiring an evaluation of the charter school program, the Legislature specifically mandated the inclusion of "comparative demographics of student enrollments in school districts of residence and the charter schools located within those districts," and further mandated that the comparison "include, but not be limited to, race, gender, socioeconomic status, enrollment of special education students, enrollment of students of limited English proficiency, and student progress toward meeting the core curriculum content standards as measured by student results on Statewide assessment tests." N.J.S.A. 18A:36A-16(e) (5).

Further, to ensure effectuation of these statutory provisions, DOE regulations require the Commissioner "to assess the student composition" of operating charter schools "and the segregative effect that the loss of students may have on the district of residence." These assessments are required both prior to the grant of the charter and on an annual basis. To facilitate this assessment, each charter school is required to submit relevant data in a format prescribed by the Commissioner. N.J.A.C. 6A:11-2.1(j) and 2.2(c).

Moreover, there is compelling data demonstrating the urgent need to conduct comprehensive assessments of segregative effects that address not only race, but also disability, English language proficiency, socio-economic status and other factors. Table 1 attached contains the individual and aggregate charter student demographics compared to the demographics of district schools for Camden, Hoboken and Newark. As this data plainly

shows, charter schools in these cities typically serve fewer free and reduced lunch eligible students, fewer students learning English, and fewer students with special education needs than district-run schools. Charter schools in Hoboken also serve fewer Black and Hispanic students than district schools. While there is variation among individual charter schools, many serve significantly fewer numbers of students in the above subgroups. For example, in Hoboken, the Elysian Charter School's student population was only 26% black or Hispanic compared to 64% in district schools. In Camden, two schools (D.U.E. Season and Environment Community Opportunity) had free/reduced lunch rates below 70% compared to 95% in district schools. In Newark, charter schools in the aggregate serve 1% English language learners compared to 9% in district schools.

As a result, limiting the initial and annual assessments of segregative effect to race is wholly inconsistent with clear constitutional, statutory and regulatory directives, and is also arbitrary and capricious. ELC therefore requests that DOE revise the regulations to ensure that the agency assesses the segregative effects of charter schools not only by race, but also on religion, ethnicity and gender, and students with disabilities, English language learner status, low-income students (socioeconomic status), and students at-risk of dropping out or with other special academic needs.

Frequency of Assessment

As discussed above, DOE's existing regulations require a segregative effects assessment be done both prior to granting a charter, N.J.A.C. 6A:11-2.1(j), and annually thereafter, N.J.A.C. 6A:11-2.2(c). The obligation is an ongoing one, and the Commissioner cannot close his eyes to segregative effects that may develop once a charter school has commenced operation. The Supreme Court was clear that the purpose of conducting assessments is to eradicate segregation if it exists: "if segregation would occur the Commissioner must use the full panoply of his powers to avoid that result." In re Grant of Charter School Appl. Of Englewood on the Palisades Charter School, 164 N.J. at 695. Accordingly, the DOE must revise its rules to codify the requirement that a segregative effects assessment be performed prior to the granting of any charter renewal or amendment, as well as prior to the granting of an application and annually thereafter.

Need for Written Assessment

There is simply no basis for DOE to acknowledge an obligation to conduct an assessment of the racial segregative effects of a charter school on a district of residence, yet make the assertion that no written assessment is required. Aside from the impossibility that DOE could rely on the memory of staff alone to retain the results of such assessments that must be conducted from year-to-year, the failure to memorialize the requisite assessments in written form violates bedrock principles governing administrative agencies. There can be no doubt that the actions of administrative agencies are subject to judicial review. While a reviewing court will grant deference to the determinations of an administrative agency, it can only do so when there has been appropriate fact-finding and when the basis for an administrative determination has been disclosed. See, e.g. In re Holy Name Hospital, 301 N.J. Super. 282, 291-92 (App. Div. 1997); 40 N.J. Prac. Appellate Practice & Procedure § 4.16(2d ed.). Administrative agencies are required as a matter of fundamental due process to provide notice of their actions and their reasons for taking them. Meyer v. NJ Dept. of Human Services, 269 N.J. Super. 310, 313 (App. Div. 1993). The failure to operate an administrative agency without such elemental transparency is the essence of arbitrary and capricious action. We ask that you immediately promulgate regulations to ensure that all assessments of the segregative effects of charter schools in all categories of student demographics and subgroups - and on applications, amendments, and annual operations - be produced in a written form that sets forth the data considered and the basis for any conclusions reached. To ensure full accountability and transparency, these written assessments should be posted on the DOE website.

FUNDING IMPACT/ DENIAL OF THOROUGH AND EFFICIENT EDUCATION

The DOE's regulations fail to codify, or even address, the Supreme Court's unequivocal directive that "the Commissioner is obligated to evaluate carefully the impact that loss of funds would have on the ability of the district of residence to deliver a thorough and efficient education," anytime that a local school district "demonstrates with some specificity that the constitutional requirements of a thorough and efficient education would be jeopardized" by the district's loss of funds to a charter school. Englewood on the Palisades II, 164 N.J. at 334-35. This requirement obviously also extends to the circumstance when the Commissioner, or the Commissioner's designee, has such information, or when third parties - parents

and stakeholder organizations - present such information, particularly in State-operated districts where charter schools serve significant portions of the district's students.

The need for initial and annual evaluations of charter impact on district funding is urgent and compelling. Newark's charter school enrollment has more than doubled in the past five years from 6,468 in FY11 to a projected 13,456 in FY15. In the same period, charter payments from the district have grown from \$91 million in FY11 to a projected \$211.5 million in FY15, a 232% increase. Over the last several years, Newark has had to reduce its overall budget and cut the budgets for individual district schools, impacting the availability of essential staff, programs and services to students in those schools. Likewise, in Camden, charter enrollment grew from 2,529 in FY11 to a projected 6,599 in FY15, a 260% increase. Transfers to charter schools increased from \$34.7 million in FY11 to a projected \$84.5 million in FY15. In the 2014-15, Camden has also reduced school-based budgets, eliminating teachers, support staff and other programs for students enrolled in district-run schools.¹

Thus, as with segregative effects, these regulations must be revised to codify the scope of the Commissioner's obligation, the necessity to conduct funding evaluations prior to the granting, renewal, or expansion of a charter school either when a district raises the issue that its ability to deliver a thorough and efficient education will be negatively impacted, or when effected students, parents and stakeholders present such information. In addition, the Commissioner must be required to conduct such an evaluation in any district where the enrollment in charter schools encompasses a significant segment of the student population, or at least 5% of the district's students. At that enrollment level, charters are no longer operating to provide discrete, innovative practices to inform the delivery of public education, but rather to replace existing district-run schools with school operated by private, non-profit organizations through the charter school program. Of course, the Commissioner's evaluation must also be memorialized in writing and posted on the Department's website.

¹ These funding and enrollment data are based upon the final DOE State Aid Notices for charter schools from FY11 and projected State Aid Notices from FY15. Figures include all resident students attending charters, regardless of the location of the charter school.

CONCLUSION

The DOE and Commissioner are well aware that a comprehensive assessment of the segregative effects of existing and proposed charter schools, and the evaluation of funding impacts of operating charters, is an issue of utmost importance to the public debate on how public education will be delivered to our State's schoolchildren, particularly in Newark, Camden and other districts where the State has authorized charter schools to serve a significant segment of the district's student population. Thus, the need for these regulatory changes are essential to ensure the Commissioner properly fulfills clear constitutional imperatives.

Sincerely,

David G. Sciarra, Esq.
Executive Director

cc: Michael Walters, AAG